

## Five Conceptions of Constituent Power

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[Note: A revised version of this paper was published in 130 *Law Quarterly Review* 306-336 (2014).]

In his history of 18<sup>th</sup> century North American constitutions, Willi Paul Adams maintained that the *Oxford English Dictionary* is “quite wrong” when it asserts that the term “constituent power”, defined as “the power to frame or alter a (political) constitution”, originated during the French Revolution.<sup>1</sup> At one level, Professor Adams is undoubtedly correct that the dictionary entry is inaccurate. The term ‘constituent power’, as he noted, was used in 18<sup>th</sup> century North America where, as early as in 1777, Thomas Young insisted that the people of Vermont were “the supreme constituent power”, not to be confused with the “supreme delegate power” of the legislature.<sup>2</sup> Marquis de Lafayette, like Professor Adams, also placed the origins of the concept in the American constitutional tradition, explicitly rejecting the view that Emmanuel Sieyes was the creator of the distinction between constituent and constituted powers.<sup>3</sup>

However, contrary to what Professor Adams, Lafayette, and others<sup>4</sup> have suggested, it is not in North America where the first formulations of constituent power occurred. As Martin Loughlin has noted, “the concept of constituent power was explicitly expressed during the [English] revolutionary debates of the mid-seventeenth century”<sup>5</sup>. Loughlin has proved this claim through an impressive analysis of early English constitutional thought, concluding that the concept of constituent power “now serves no juristic function”, having become “entirely absorbed into the doctrine of the absolute authority of the Crown-in-Parliament to speak for

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<sup>1</sup> Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Rowman & Littlefield Publishers 2001) at 63.

<sup>2</sup> “Dr. Young’s Letter” in Zadock Thompson, *History of Vermont: Natural, Civil, and Statistical in Three Parts, with a New Map of the State and 200 Engravings* (1842) at 105-107.

<sup>3</sup> For a discussion, see Raymond Carré de Malberg, *Teoría General del Estado* (Fondo de Cultura Económica, 1948) at 1186.

<sup>4</sup> Antonio Negri and Claude Klein also trace back the phrase ‘constituent power’ to 1777 North America. Antonio Negri, *Insurgencies: Constituent Power and the Modern Age* (University of Minnesota Press, 1999) at 145. Claude Klein, “A Propos Constituent Power: Some General Views in a Modern Context” in *National Constitutions in the Era of Integration* (Antero Jyränky ed.) (The Hague: Kluwer Law International, 1999) at 31.

<sup>5</sup> Martin Loughlin, ‘Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice’, in Martin Loughlin and Neil Walker (eds.) *The Paradox of Constitutionalism*, Oxford: Oxford University Press, 2007) at 28.

the British nation".<sup>6</sup> But if one digs deeper into English constitutional discourse, one will find that the *concept* of the people's constituent power was not only present in mid-17<sup>th</sup> century England: the very term 'constituent power' was deployed by English jurists and commentators well before the French and American revolutions and has since then played different but related roles in the development of English public law (as well as in the development of public law in different constitutional traditions).

For example, in 18<sup>th</sup> century Great Britain, there was talk of 'constituent powers' in the plural<sup>7</sup>, to refer to the entire citizenry as a body superior to the ordinary legislative assembly. This is the case of a letter published in 1770, where 'Junius' argued that the House of Commons had the duty of interpreting the will of the people and conveying it to the Crown, and if that interpretation was false or misleading, "the constituent powers" were called to make their preferences known and challenge the authority of the ordinary institutions of government.<sup>8</sup> Junius distinguished between the "constituent" and the "representative body", arguing that the latter did not possess an "original power", but a power delegated to them by the constituent people.<sup>9</sup> Despite the existence of these and even earlier uses of the term in English<sup>10</sup>, there is a sense in which the accuracy of the entry of the *OED* cannot be disputed.

It was during the French Revolution where a radical conception of the people's exclusive *constitution-making* faculty, their sovereignty over the constitutional regime, was for the first time identified with the term constituent power. However, the French is not the only conception of constituent power that has played (or that plays) a role in modern and contemporary constitutional theory. Some 18<sup>th</sup> century radicals, such as the previously mentioned Young and Junius, used the term not to refer to the people's exclusive constitution-making faculty, but to their right to instruct, and be obeyed, by representatives. If representatives repeatedly acted against the wishes of the constituent subject -particularly if those wishes related to important constitutional matters- popular resistance was justified. A

<sup>6</sup> At 28.

<sup>7</sup> The use of the phrase 'constituent power' in the plural ('constituent powers') is not limited to these early references. See F.M. Brookfield, "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach", 5 *Otago Law Review* 603 (1984) at 605.

<sup>8</sup> *Junius: Stat Nominis Umbra*, Vol. 2, Letter XXXII (3 April 1770) (London: Printed for Henry Sampson Woodfall, 1772) at 18.

<sup>9</sup> *The Letters of Junius*, Vol. 2, Letter XXIX (not dated) (London: Printed for J. Wheble in Pater-Noster Row, 1770) at 180.

<sup>10</sup> There are also pre-French Revolution references to the concept of constituent power in other languages. See José de Seabra da Silva, *Deducción Chronológica y Analítica* (Madrid: Librería Francisco Fernandez, 1768), p. 134.

different, but related view can be found in the work of 17<sup>th</sup> social contract theorists like George Lawson and John Locke, who can be seen as advancing a particular conception of constituent power even if they -unlike other 17<sup>th</sup> century authors with similar ideas- did not make explicit uses of the term.

The conception of constituent power developed by Lawson and Locke is in fact quite different to the one that appeared in revolutionary France. These two authors conceived constituent power as part of the right of resistance, maintaining that the community's power to create a new constitutional order arose *only* in situations of serious governmental abuse. To the previous three conceptions of constituent power, one has to add two different ones: constituent power as vested in a sovereign parliament (and sometimes seen as divided among the institutions that comprise Parliament) and constituent power as the Crown's or Imperial Parliament's faculty of granting constitutions to its colonies (and 'full' or 'plenary' constituent power to the colonial legislatures). These, I believe, are not mere coincidental uses of the term 'constituent power' that refer to disparate constitutional phenomena, but are in fact connected in important ways.

By 'mapping' constituent power, this article aims to improve our grasp of a concept that, while having its roots in a somewhat remote constitutional past, is increasingly present in contemporary constitutional theory. At the same time, it will show that the concept of constituent power has been a central concern of the law in ordered societies and not simply a product of the disorder of revolution. As will be seen, unearthing the different historical uses and meanings attributed to constituent power can increase our understanding of constitutional debates in the common law world about parliamentary sovereignty, common law constitutionalism, and the limits of constitutional change. The article is organised as follows. Part I will examine the conception of constituent power as vested in a sovereign parliament, which is best reflected in the British constitution. Although rarely deployed by contemporary English jurists, the idea of parliament possessing constituent power is still used by some judges and academics, and has also found its way to some ex-British colonies.

Part II will explore a different conception of constituent power, but one that also saw Parliament as one of its potential bearers: the Imperial Legislature or the Crown as the constituent subject of the new colonies. This conception saw Parliament (or, in some cases, the Crown acting by itself) as possessing a power to create colonial legislatures. In the 19<sup>th</sup>

and 20<sup>th</sup> centuries, the exercise of this power was understood as allowing Parliament to formally attribute colonial legislatures with ‘full’ or ‘plenary’ constituent power to re-create their constitutional order. Part III will consider constituent power as a right to instruct representatives and to be obeyed by them. In the context of this discussion, which took place mainly during the 18<sup>th</sup> century, the term ‘constituent power’ was frequently deployed to point toward a sovereign people (as opposed to a sovereign Parliament or King). Part IV of the article will explore the 17<sup>th</sup> century conception of constituent power as a right of resistance, as proposed by Lawson and Locke. Under this conception, constituent power is channelled (or suppressed) through special amendment procedures, reserving its exercise to situations of oppression.

Then, in Part V, the article will contrast that conception with the theory of constituent power developed by Emmanuel Sieyes in 18<sup>th</sup> century France. Sieyes’ conception has made its way to Latin America (and it is also reflected in some state constitutions in the United States), where new fundamental laws attempt to institutionalise the -normally extra-legal- exercise of the people’s constitution-making power, and to allow it to take place outside the ordinary institutions of government. It will be shown that these two last conceptions belong, respectively, to a radical and a liberal democratic theory. Unfortunately, they are routinely conflated in contemporary literature, obscuring the insights (as well as the dangers and promises) provided by both. Finally, Part VI offers some final thoughts on the connections between the five conceptions of constituent power and on the relevance of the theory of constituent power for constitutional theory and practice in the 21<sup>st</sup> century.

## I. Constituent Power as Parliamentary Sovereignty

In his *Democracy in America*, Alexis de Tocqueville described the Westminster Parliament as “at once a legislative and a constituent assembly”.<sup>11</sup> By this he meant that, unlike in countries where the constitution could only “be altered by the will of the people...according to established rules”, the Westminster Parliament, one of the “ordinary powers of society”, could change the constitution using the same procedures that are used for the adoption of ordinary laws.<sup>12</sup> According to Dicey, the French author had provided a “convenient formula”

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<sup>11</sup> Alexis de Tocqueville, *Democracy in America* (New York: New American Library, 1956) at 74. This is of course a language familiar to the French Revolution. See for example, *Speeches of M. de Mirabeau, the Elder, Pronounced in the National Assembly of France: to Which is Prefixed, a Sketch of his Life and Character*, Vol. 1 (Printed for J. Debrett, 1792) at 225.

<sup>12</sup> De Tocqueville, fn. 11 above, at 74.

for explaining the principle that Parliament may create any law it wishes. However, distancing the English tradition from the concept of constituent power, he added that since under the English constitution there was no clear distinction between fundamental and non-fundamental laws, “the very language expressing the difference between a ‘legislative’ assembly which can change ordinary laws and a ‘constituent’ assembly which can engage in fundamental constitutional change...has to be borrowed from the political phraseology of foreign countries”.<sup>13</sup>

The concept of constituent power has many affinities with the doctrine of parliamentary sovereignty: it points towards a supreme power, capable of producing positive laws that cannot be invalidated by any other institution. It is therefore not surprising that, in a place where Parliament has for centuries been seen as a sovereign body, the idea of a *constituent* power, a power that is independent from and that constitutes government, does not appear to have played a major constitutional role. But, contrary to Dicey’s suggestion, the term ‘constituent power’ was present in 17<sup>th</sup> and 18<sup>th</sup> English century constitutional discourse. In most cases, however, it was simply used to refer to each of the entities that conform, or constitute, Parliament (just as courts sometimes refer to the Queen, Lords, and Commons, as the “constituent elements of Parliament”<sup>14</sup>), and not to the exercise of a certain type of power. For example, in an essay published in the *Gentleman’s Magazine* in 1734, it was maintained that “Whatever tends to destroy the *Constitutional Independency of any constituent power of the Legislature*, tends to destroy the Constitution itself; and consequently the real Security of the *People’s Liberties*”.<sup>15</sup>

There were nevertheless more ambiguous (and earlier) uses of the phrase, such as when, in 1679 and during the Exclusion Bill crisis, Sir William Coventry urged the Committee of Lords and Commons to agree to the trial of the five Lords suspected of being involved in the ‘popish plot’, since “we know not how the Lords will insist upon the constituent power of their House”.<sup>16</sup> Here, the House of Lords, as one of the “independent and substantial bases of

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<sup>13</sup> A. V. Dicey, *Introduction to the Study of the Law and the Constitution* (London: Macmillan, 1959) at 37.

<sup>14</sup> See for example, *Jackson v. Attorney General* [2005] UKHL 56, para. 73 (Lord Steyn).

<sup>15</sup> *The London Magazine or Gentleman’s Monthly Intelligencer*, Vol. 3, Craftsman, Sept. 7, No. 427 (1734) at 539-540. For a similar idea in the context of a history of the Roman State published in London in 1781, see Thomas Bever, *The History of the Legal Polity of the Roman State: And the Rise, Progress and Extent of the Roman Laws* (London: Printed for W. Strahan; and T. Caldwell, 1781) at 406.

<sup>16</sup> *Debates of the House of Commons: From the Year 1667 to the Year 1694*, Vol. 7 (Great Britain, Parliament, House of Commons, 1763) at 295.

power”<sup>17</sup> that comprise Parliament, was seen as capable of exercising an unspecified ‘constituent power’ in a way that prevented Parliament from acting in a certain way. In this sense, although in some cases the use of the term ‘constituent power’ appears to go slightly beyond merely identifying certain institutions as “the constituent parts of the sovereign power, or Parliament”<sup>18</sup>, and seems to refer to the actual legal powers of those institutions, these uses of the phrase do not explicitly point towards Parliament as a potential constitution-maker. There are partial exceptions, of course.

A good example is provided by a 1735 essay published in the aforementioned *Gentleman’s Magazine*, where it was maintained that “the *Government* ought always be in subjection to the *legal Constitution*” and, accordingly, that “the *legal Constitution* established by the *three Constituent Powers*, ought always to be in Subjection to the *natural Constitution* of Things established by *God himself*”.<sup>19</sup> Somewhat later, in 1792, when describing Parliament as vested with the power -once attributed to sovereign princes- to dispose of “our lives and properties”, Thomas Oldfield stated that the “constituent power consists in every Englishman, from the prince to the peasant, and of whatever state, dignity, or quality, possessing the right of being present in parliament either in person or by procuration or attorney; and the consent of the parliament is understood to be every man’s consent”.<sup>20</sup> Nevertheless, it was not until the 19<sup>th</sup> and early 20<sup>th</sup> century when we begin to see more recurrent references to Parliament’s constituent power<sup>21</sup>, particularly in the context of the British Empire’s relationship with its colonies. Here, the Westminster Parliament was seen as the bearer of the constituent power in relation to the colonial legislatures.

For example, in 1929, Arthur Berriedale Keith referred to the Dominion Parliaments’ “inability to exercise the unfettered constituent power which belongs to the Parliament of the United Kingdom”.<sup>22</sup> The colonial legislatures’ power of constitutional change was usually

<sup>17</sup> Jackson, fn. 14 above, para. 41.

<sup>18</sup> *Encyclopaedia Britannica: Or a Dictionary of Arts, Sciences and Miscellaneous Literature*, Vol. 13, No. 2 (1810) at 759.

<sup>19</sup> *The Gentleman’s Magazine*, Vol. 5 (London, England 1735) at 184.

<sup>20</sup> Thomas Hinton Burley Oldfield, *An Entire and Complete History, Political and Personal, of the Boroughs of Great Britain* (London: Printed for G. Riley, 1792), Vol. 1, at 9.

<sup>21</sup> This first conception is about Parliament as the (continuous) bearer of the constituent power, as a Parliament. That is to say, it is not about instances in which legislatures have temporarily transformed themselves into constituent assemblies and adopted new constitutions, as it has been the case of many jurisdictions in Latin America and Europe.

<sup>22</sup> Arthur Berriedale Keith, *The Sovereignty of the British Dominions* (London: Macmillan and Co., Limited, 1929) at 197.

restricted, but to the extent that they were authorized to alter some aspects of the constitution given by the Imperial Parliament, they were seen as possessing a degree of ‘constituent power’.<sup>23</sup> This explains why a contributor to the *Nelson Examiner*, writing in 1862, referred to the “wide distinction between ordinary and constituent functions in a Government”, and maintained that the *Constitution Act, 1852* (U.K.) vested “constituent power” in New Zealand’s General Assembly, even though this was not an absolute power.<sup>24</sup> The ‘constituent power’ of colonial and dominion assemblies was seen as equivalent to the power of *amending* a constitution (not of creating a new one), and it could be very limited in scope. This is why Keith maintained that the Parliament of the Dominion of Canada had “a mere scintilla of constituent power”, as it could only change certain provisions of the constitution (and not the most important ones).<sup>25</sup> As we will see in Part II, in the context of colonial legislatures, constituent power appears deprived of one of its usually defining characteristics: its independency from, and superiority to, the established constitutional forms.

Explicit references to the constituent power of Parliament are somewhat rare in late 20<sup>th</sup> and 21<sup>st</sup> century English constitutional discourse (at least outside the context of Parliament’s relationship with its colonies). However, in the context of the -old but still going- debate about the continuing or self-embracing sovereignty of the Westminster Parliament, the idea of Parliament as the bearer of constituent power makes sporadic appearances. As is well known, the orthodox conception of parliamentary sovereignty sees Parliament’s law-making power as ‘continuing’ and not ‘self-embracing’, which means that Parliament is unable to deprive itself of its sovereign authority. In support of that view, Jeffrey Goldsworthy has maintained that “[w]hether Parliament has constituent power to limit or abdicate parts of its own sovereignty is just another way of asking whether its sovereignty is continuing or self-embracing” and that “Parliament can be said to have constituent power to change every part of the unwritten constitution except, arguably, that which grants its own law-making authority”.<sup>26</sup>

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<sup>23</sup> At 197.

<sup>24</sup> “Constituent Reform”, *Nelson Examiner and New Zealand Chronicle*, Vol. XXI, Issue 56, 2 July, 1862, p. 4.

<sup>25</sup> Keith, *The Sovereignty of the British Dominions*, fn. 22 above, at 199.

<sup>26</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010) at 111. For another example of the use of the concept of constituent power in the context of the ‘continuing’/‘self-embracing’ sovereignty debate, see George Winterton, *State Constitutional Landmarks* (Federation Press, 2007) at 126.

In some of these discussions, references are made to the idea of Parliament having a ‘limited’ constituent power (a constituent power incapable of abolishing itself). If one sees Parliament as a legitimate bearer of the constituent power, there is nothing exuberant about the idea that it cannot deprive itself of its unlimited law-making faculty. In fact, the same has been said of the sovereignty of the people. For example, in an 1814 letter to John Taylor of Caroline, John Adams wrote that the “the *summa potestatis*, the supreme, sovereign, absolute, and uncontrollable power, is placed by God and nature in the people, and they can never divest themselves of it”.<sup>27</sup> Among the arguments made against that view, Goldsworthy identifies what he calls “the constituent power theory”, a view also considered by Peter Oliver,<sup>28</sup> which suggests that the rule of recognition of the British legal order establishes the continuing sovereignty of Parliament, but that Parliament possesses a constituent power to alter the rule of recognition.<sup>29</sup> Similarly, Vernon Bogdanor has recently suggested that if Parliament can bind itself, “then it is indeed, as Tocqueville thought, a constituent as well as a legislative authority”.<sup>30</sup>

The conception of Parliament as the bearer of constituent power has migrated to some ex-British colonies (although not necessarily via English constitutional discourse).<sup>31</sup> The most telling example is that of India, which in the second part of the 20<sup>th</sup> century experienced a struggle between Parliament and the courts as to the extent of the former’s authority to reform the constitution. During this struggle, the Indian Parliament adopted the 24<sup>th</sup> amendment, which stated that “...Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution....”. As a response, the Indian Supreme Court adopted the doctrine of the basic structure in the famous case of

<sup>27</sup> John Adams, *The Works of John Adams*, vol. 6 (*Defence of the Constitutions Vol. III cont'd*, Davila, *Essays on the Constitution*) (1851). In fact, it is even an earlier idea: in the late 13<sup>th</sup> century Jacques de Révigny had stated that the Roman people could not alienate their ‘jurisdiction’ “even if they wanted to relinquish it”. Quoted in Brian Tierney, *Religion and the Growth of Constitutional Thought 1150-1650* (Cambridge: Cambridge University Press, 1982) at 58.

<sup>28</sup> Goldsworthy, fn. 26 above, at 111. Peter Oliver attributes this view to Neil McCormick. Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005).

<sup>29</sup> Goldsworthy, fn. 26 above, at 116-117. This view is rejected by Goldsworthy, fn. 26 above, at 117-118.

<sup>30</sup> Vernon Bogdanor, “Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty”, *Oxford Journal of Legal Studies*, Vol. 32, No. 1 (2012) at 190. See also Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971) at 47.

<sup>31</sup> For example, the work of Dietrich Conrad, the German jurist, was particularly influential in the adoption of the doctrine of the basic structure in India (partly based in the theory of constituent power). Dietrich Conrad, “Limitation of Amendment Procedures and the Constituent Power” *The Indian Year Book of International Affairs* (India: Madras, 1966-1967).

*Kesavananda v. Kerala.*<sup>32</sup> According to this doctrine, Parliament's power of constitutional reform can be used to amend any constitutional provision, but not to alter the constitution's fundamental core (which is another way of saying that Parliament lacks constituent power).<sup>33</sup> The Indian Parliament responded with the adoption of the 42<sup>nd</sup> amendment, which asserted again its unlimited "constituent power" in an attempt to abolish the basic structure doctrine. This section of the amendment was eventually struck down by the Indian Supreme Court, which insisted that Parliament only had a 'limited amending power' (for the court, the true bearer of the constituent power was not Parliament but the people, even if it was unclear whether they could ever engage in an exercise of constituent power outside the context of a political revolution).<sup>34</sup>

Interestingly, even in the absence of any direct references to the term 'constituent power', the *obiter dicta* in some recent English cases, of which the most notable is *Jackson v. Attorney General*<sup>35</sup>, is highly reminiscent of the approach of courts in other jurisdictions (such as India) of finding implicit limits to Parliament's power of constitutional reform.<sup>36</sup> For example, in *Jackson*, Lord Steyn referred to certain "constitutional fundamentals" (such as the possibility of judicial review of administrative action) that "even a sovereign Parliament" cannot abolish.<sup>37</sup> This approach, sometimes identified as 'common law constitutionalism', if ever accepted as part of the English constitution, would amount to a rejection of Parliament as the bearer of constituent power (i.e. a change in the rule of recognition).<sup>38</sup> It is not clear who would emerge as the alternative constituent subject, but it might be that common law constitutionalism's natural conclusion will be the one suggested by Alison Young.

<sup>32</sup> 1973 (S.U.P.) S.C.R. 0001.

<sup>33</sup> There are other jurisdictions in which the conception of Parliament as the bearer (or potential bearer) of the constituent power has been present. For example, in *United Mizrahi Bank v. Migdal Cooperative Village*, 49(iv) P.D. 221 (1995), para. 18, the former Chief Justice Aharon Barak stated that "The Knesset has 'two hats': the hat of constituent authority and the hat of legislative authority".

<sup>34</sup> *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 SC 1789. For a discussion, see Upendra Baxi, "The Perils and Politics of the Amending Power" in *Reconstructing the Republic* (Delhi: Indian Association of Social Sciences Institutions, 1999).

<sup>35</sup> *Jackson*, fn. 14 above. A notable example outside the United Kingdom is provided by Lord Cooke in *Taylor v. New Zealand Poultry Board* [1984] 1 N.Z.L.R. 394, 398 (CA).

<sup>36</sup> A similar view has been defended in T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), at 263

<sup>37</sup> *Jackson*, fn. 14 above, para. 102

<sup>38</sup> Part of the reasoning of the Court of Appeal decision's in *Jackson* was based on a distinction between non-fundamental and fundamental constitutional change (the latter of which could only be adopted by Parliament as ordinarily constituted). This approach suggests that, regardless of the 1911 and 1949 Acts, the consent of the Lords was needed for a true exercise of constituent power. *Jackson v. Attorney General*, [2005] E.W.C.A. Civ. 126, para. 45.

That is to say, that the “constituent power” (understood as the ability to alter the rules of law-making and the rules about how Parliament is constituted) lies “in the hands of both the legislature and the courts”.<sup>39</sup> Nevertheless, there is another way of understanding the relationship between the doctrine of parliamentary sovereignty and the concept of constituent power: constituent power involves the power to create a Parliament, and it has to be possessed by an entity prior to Parliament. Can this entity be the people? During the constitutional crisis of 17<sup>th</sup> century England, it is well known, this approach was highly influential (even though the people’s constituent power was usually presented as part of a justification for resistance). But before moving to that discussion, we have to consider in more depth the idea of the Imperial Parliament (or in some cases the Crown acting alone) as possessing the right of creating constitutions for the colonies, and of granting constituent power to the colonial legislatures.

## **II. The Crown and Parliament as Sources of Constituent Power**

As seen above, the Westminster Parliament and the institutions that comprise it have been described by many as constituent powers. There is, however, another sense in which Parliament may exercise constituent power: as the ultimate constitution-maker for the British colonies. This ‘constituent power’ was not always possessed by Parliament but was understood to fall under the prerogatives of the Crown.<sup>40</sup> This is why, in a 1760 book that examined the historical and political basis of British colonialism in North America, William Douglas explained that the Governor of Massachusetts frequently intervened with the operation of the General Assembly of the colony and that, in this sense, it became “a delegated power assuming more than the sovereign constituent authority [i.e. the King] chuses to venture upon”.<sup>41</sup>

The nature of the Crown’s constitution-making power was the matter of judicial controversy early in the 17<sup>th</sup> century, where the well known distinction between conquered and settled

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<sup>39</sup> Alison Young, “Sovereignty: Demise, Afterlife, Or Partial Resurrection?”, *International Journal of Constitutional Law*, vol. 9, No. 1, 163-171 (2011) at 170. For judicial approaches that come close to exemplify this idea, see *Lisbon Case*, BVerfG, 2 BvE 2/08, paras. 216-218 and Sentencia 050-2004-AI/TC (Constitutional Court of Peru), para. 17. See also Chris Thornhill, “Contemporary Constitutionalism and the Dialectic of Constituent Power”, 1(3) *Global Constitutionalism* 369-404 (2012).

<sup>40</sup> For a contemporary discussion of the powers of the Crown in a New Zealand context, which draws on the theory of constituent power, see Janet McLean, “‘Crown Him with Many Crowns’: The Crown and the Treaty of Waitangi”, 6 *New Zealand Journal of Public and International Law* 35 (2008).

<sup>41</sup> William Douglas, *A Summary, Historical and Political, of the First Planting, Progressive Improvements, and Present State of the British Settlements in North-America* (London, 1760) at 474.

colonies was developed.<sup>42</sup> According to Lord Coke's reasoning in *Calvin's Case*<sup>43</sup>, the King was an absolute monarch with respect to conquered (or ceded) colonies and could thus exercise the Royal Prerogative in any way he deemed desirable.<sup>44</sup> As stated in *Halsbury's Laws of England*, in a conquered colony the Crown has "full power to establish such executive, legislative and judicial arrangements as the Crown thinks fit", and the "Crown's legislative and constituent powers are exercisable by Order in Council, Letters Patent or Proclamation".<sup>45</sup> For example, it was once argued that since Jamaica had been conquered (which was itself a matter of controversy)<sup>46</sup> the King should be seen "as an absolute sovereign, free to impose what laws and constitution he pleased".<sup>47</sup> However, once a constitution was adopted for a conquered colony, the Crown's plenary power to legislate ended; in other words, the Crown's exercise of its constitution-making power at one moment extinguished the potential exercise of an unlimited law-making faculty in the future.<sup>48</sup>

The doctrine applicable to these colonies was famously qualified by Lord Mansfield in *Campbell v. Hall*, in which it was stated that although the King could potentially create and re-create constitutions for conquered colonies without the consent of Parliament ("no man ever...[has] controverted that the King might change part or the whole of the law or political form of government of a conquered dominion")<sup>49</sup>, if he wanted to adopt any laws "contrary to fundamental principles", he had to act in his capacity as part of the "Supreme Legislature".<sup>50</sup> This does not mean, however, that the constituent power of the King with respect to conquered colonies was subject to substantive limits found in the common or statute law of

<sup>42</sup> Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (London: Printed for Joseph Butterworth and Son, 1820) at 29.

<sup>43</sup> (1608) 7 Co. Rep. I; 2 St. Tr. 559.

<sup>44</sup> An embryonic formulation of this idea is contained in Henry VII's letters patent of 1496, where he authorised John Cabot to "subdue, occupy, and possess" and "set up our banners and ensigns in every village, town, castle, isle, or mainland of them newly found". "Henry VII's Letters Patent to John Cabot, 1496" in *From Empire to Commonwealth: Principles of British Imperial Government* (John Simmons ed.) (London: Odhams Press Limited, 1949) at 35.

<sup>45</sup> *Halsbury's Laws of England*, 4<sup>th</sup> ed, vol. 6 (2003), para. 823.

<sup>46</sup> See Rose-Marie Belle Antonie, *Commonwealth Caribbean Law and Legal Systems* (Routledge, 2008) at 76-79.

<sup>47</sup> Arthur Berriedale Keith, *Constitutional History of the First British Empire* (Oxford: Clarendon Press, 1930) at 11. The idea was that a conqueror derived its powers from God alone, not from the consent of his subjects. J.P. Sommerville, *Royalists & Patriots, Politics and Ideology in England 1603-1640* (London and New York: Longman, 1999) at 59, 65.

<sup>48</sup> Anne Twomey, "Fundamental Common Law Principles as Limitations Upon Legislative Power", Sydney Law School, *Legal Studies Research Paper* No. 10/29 (February 2010) at 8.

<sup>49</sup> (1774) 98 ER 848, 896.

<sup>50</sup> At 896.

England.<sup>51</sup> Lord Mansfield probably used the phrase ‘fundamental principles’ to refer to “the separation of powers between Crown and Parliament and the ultimate supremacy of Parliament in every aspect of the relationship between Crown and Parliament, including the relation to the Empire”.<sup>52</sup> In other words, what Lord Mansfield was making clear was that the King could alter the *colonial* constitution in any way he wanted, but he lacked constituent power to change the *British* constitution, as that power resided only in the Crown-in-Parliament.<sup>53</sup>

In terms of settled colonies, the traditional doctrine established in *Calvin’s Case* maintained that the King lacked full constituent or legislative power, and subjects could only be bound by laws adopted by the Crown-in-Parliament or by a local representative assembly. Inhabitants of these colonies were seen as carrying with them the law of England and therefore entitled to be represented in their own legislature.<sup>54</sup> Accordingly, the Crown “could constitute a Legislature containing this representative element”, but if “it is desired to establish any different form of legislature...this must be done by Act of Parliament”.<sup>55</sup> As noted by Sir Kenneth Robert-Wray, with respect to settled colonies, “the Crown has *a* constituent power”, but this power was limited in the sense that it could only create a constitution that provided for a specific form of legislative assembly.<sup>56</sup> And where that was not possible, as was determined to be case in the Falkland Islands and in the colonies of the West Coast of Africa, the Crown could only act through statutory authority.

In this sense, in settled colonies the ultimate constitution-making power rested not in the prerogative of the Crown but in that of Parliament. Moreover, it was generally accepted that once the Crown granted a constitution for a settled colony “it divests itself of the power to revoke or amend [it] unless it expressly reserves that power in the instrument granting the

<sup>51</sup> The king, however, was understood to be legally bound by “the articles on which the country is surrendered or ceded”. Chitty, fn. 42 above, at 29.

<sup>52</sup> T.T. Arvind, “‘Though it Shocks One Very Much’: Formalism and Pragmatism in the *Zong* and *Bancoult*”, *Oxford Journal of Legal Studies*, Vol. 32, No. 1 (2012) at 129.

<sup>53</sup> A similar point was recently made in the dissenting opinion by Lord Rodger of Earlsferry in *Regina (Bancoult) v. Secretary of State for Foreign and Commonwealth* [2008] UKHL 61 at para. 90.

<sup>54</sup> Keith, *Constitutional History*, fn. 47 above, at 9-10.

<sup>55</sup> Arthur Mills, *Colonial Constitutions: An Outline of the Constitutional History and Existing Government of the British Dependencies* (London: John Murray, Albemarle Street, 1856) at 19.

<sup>56</sup> Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (F.A. Praeger, 1966) at 151. This common law rule was altered through the *British Settlements Acts*. For a discussion, see Roberts-Wray, *Commonwealth and Colonial Law*, at 166-172.

constitution”.<sup>57</sup> However, in a 1965 case, Lord Denning maintained that “[t]he implied renunciation by the Crown only applies while the legislative institutions are in existence and capable of functioning”, and when these colonial institutions are incapable of doing so, the Crown can “resort to its prerogative power to amend the constitution or set up a new one”.<sup>58</sup> In a 2008 case about the British Indian Ocean Territory, Lord Mance appeared to suggest an additional limitation: “The Crown’s ‘constituent’ power to introduce a constitution for a ceded territory is a power intended to enable the proper governance of the territory, at least among other things for the benefit of the people inhabiting it. A constitution which exiles a territory’s inhabitants is a contradiction in terms.”<sup>59</sup>

The constituent power of the King was also subject to similar limits in those colonies with constitutions granted by charter.<sup>60</sup> In those cases, it was argued that the King possessed a constituent power that was temporarily exhausted in the act of constitution-making, and -akin to Lord Denning’s suggestion above- to be exercised only in “cases of positive necessity, and upon an extraordinary exigency”<sup>61</sup>, as when the colonial government becomes unable to protect the inhabitants of the colony. This is why, in the mid-19<sup>th</sup> century, a writer in *The Spectator*, explained that in turning the Cape of Good Hope into a chartered colony, the Crown divested itself of its unlimited constitution-making power over the colonial territory: “As the chrysalis die in giving birth to the fly, so the constituent power of the Crown expired when it performed the act of granting a constitution”.<sup>62</sup>

During the 17<sup>th</sup> century, Parliament frequently ‘intruded’ in colonial constitution-making (particularly during the interregnum period), but the responsibility for the creation of constitutions and forms of government generally fell in the Crown.<sup>63</sup> Nevertheless, in the late 18<sup>th</sup> century Parliament engaged in clear exercises of constituent power within the

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<sup>57</sup> *Sabally and N’Jie v. H.M. Attorney-General* [1965] 1 Q.B. 273, 279 (CA) (per Salmon L.J. at first instance). See also *Sammut v. Strickland* [1938] AC 678; *In re Colenso* (1865) 3 Moo PC NS 115.

<sup>58</sup> *Sabally*, fn. 57 above, at 293.

<sup>59</sup> *Regina (Bancoult) v. Secretary of State for Foreign and Commonwealth* [2008] UKHL 61(para. 157).

<sup>60</sup> Chitty, fn. 42 above, at 33. These charters were in the nature of contracts, and “could be legally revoked only by the courts on suit brought by the Crown, showing that their provisions had been violated by the patentees”. George Louis Beer, *The Origins of the British Colonial System 1578-1660* (Gloucester, Massachusetts: Peter Smith, 1959) at 304. This was the case, for example, of the charter of Virginia, which was declared forfeited by the Lord Chief Justice in 1624. Louis Beer, at 306-307. The Virginia Company was replaced by a group of commissioners which had the mandate of “devising a form of government for the colony”. Louis Beer, at 309.

<sup>61</sup> Chitty, fn. 42 above, at 38.

<sup>62</sup> “A Tale of Colonial Government” (from *The Spectator*), New Zealander, Vol. 7, Issue 857 (November 1851).

<sup>63</sup> See Arthur Mills, *Colonial Constitutions: An Outline of the Constitutional History and Existing Government of the British Dependencies* (London: John Murray, Albemarle Street, 1856) at 2. See also Beer, fn. 57 above, at 348, 362.

Empire, creating constitutions for Senegambia and Quebec by Acts of 1765 and 1774, respectively.<sup>64</sup> By the 19<sup>th</sup> and early 20<sup>th</sup> centuries, the question of the constituent power of the Imperial Parliament, as well as that of the colonial legislatures, had become the subject of interesting legal controversies. In this context ‘constituent power’ made frequent appearances in judicial opinions and academic writings. The term was used to refer to the unlimited constitution-making power of Parliament with respect to the colonies and, in some cases, to the constitution-making power attributed to the colonial legislatures. This is why (and in contrast to Dicey’s depiction of ‘constituent power’ as belonging to the political phraseology of foreign countries), Roberts-Wray wrote in *Commonwealth and Colonial Law* that the “common law recognizes a distinct difference between the constituent power and the ordinary legislative power”.<sup>65</sup>

Although “non-sovereign”, colonial assemblies were commonly seen as potentially holding constituent power, thus becoming, as Henry Jenkyns noted, “both legislative and ‘constituent’ assemblies”.<sup>66</sup> Accordingly, a 1850 essay published in *The Spectator* on ‘The Australian Colonies Government Bill’ maintained that “we ought either to make a good constitution of ‘local self-government’ for [them], or we ought to give them constituent authority to make one for themselves”.<sup>67</sup> In New Zealand, where the former course was followed, a contributor to the *Nelson Examiner* writing in 1862 explained that the *Constitution Act 1852* (U.K.) attributed the New Zealand General Assembly with “constituent power”, since it granted that body with the ability to alter several parts of that Act’s provisions. For that author, however, it was “most desirable that the constituent powers of the government should be curtailed before they are abused”, and a mechanism was needed to guard against “rash and revolutionary changes”.<sup>68</sup> “The best machinery which could be devised for exercising these powers of constituent reform”, he argued, “may perhaps be imitated from the constitutions of some of the United States of America”.<sup>69</sup> Ten years earlier another contributor to the same periodical stated that “[t]he constituent power given by the Act is the great merit of the whole measure”.<sup>70</sup>

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<sup>64</sup> Keith, *Constitutional History*, fn. 47 above, at 179.

<sup>65</sup> Roberts-Wray, fn. 56 above, at 158.

<sup>66</sup> Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Oxford: Clarendon Press, 1902) at 72.

<sup>67</sup> “The Australian Colonies Government Bill”, *The Spectator*, Volume VIII, 23 February 1850, at 181. See also the expressions of Sir William Molesworth during the discussion of the Bill. “The Australian Colonies Government Bill”, at 174.

<sup>68</sup> *Nelson Examiner and New Zealand Chronicle*, Volume XXI, Issue 56, 2 July 1862, at 4.

<sup>69</sup> At 4.

<sup>70</sup> *The Nelson Examiner and New Zealand Chronicle*, Volume XI, Issue 559 (November 1852) at 154.

In 1947, following the passage of the *New Zealand Constitution (Amendment) Act 1947* by the Westminster Parliament, the General Assembly was granted the ability to alter any of the provisions of the *Constitution Act 1852*. As a result, some New Zealand jurists identify 1947 as the year in which the General Assembly acquired “plenary” or “full constituent power”.<sup>71</sup> But the scope of the constituent power granted by Westminster to the General Assembly remained a subject of debate in New Zealand well into the 20<sup>th</sup> century. For example, in an article published in 1984, F.M. Brookfield attempted to provide an answer to the question: “Can the General Assembly in the exercise of its constituent powers, change the structure of government so as to protect constitutional legislation from repeal by the normal, simple majority-vote procedures?”<sup>72</sup>

The question was interesting since, if answered in the affirmative (as Brookfield did in that article)<sup>73</sup>, it meant that the Westminster Parliament, by granting ‘full constituent power’ to the General Assembly, had granted a power arguably not possessed by itself, creating an entity not permanently condemned to be continually sovereign. In the language of constituent power, this meant that the Westminster Parliament, as an assembly possessing both legislative and constituent jurisdiction, had a constituent power similar to the one ascribed to the people during the French and American Revolutions, a power that could not be abdicated. In contrast, colonial assemblies that were granted ‘full constituent power’ by the Westminster Parliament could abdicate their constituent jurisdiction and become limited legislatures (arguably transferring, in that very act, a non-abdicable constituent power to the people).

This was in fact at the heart of the discussion in *Attorney General v. Trethewan*, where it was determined that the Legislature of New South Wales was bound to respect Section 7a of the *Constitution Act 1902* (NSW), which required a referendum before the legislature’s upper

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<sup>71</sup> See for example, Philip Joseph “Foundations of the Constitution” 4 *Canterbury Law Review* 58 (1989) at 61; F.M. Brookfield, “Kelsen, The Constitution, and the Treaty” 15 *New Zealand Universities Law Review* 163 (1992) at 170. For a different use of the term by a New Zealand jurist see Paul McHugh *The Māori Magna Carta: New Zealand and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 22.

<sup>72</sup> F.M. Brookfield, “Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach” 5(4) *Otago Law Review* (1984) at 605.

<sup>73</sup> In a later article, Professor Brookfield maintained that with the adoption by New Zealand of the *Constitution Act 1986* (and the repeal of the 1947 Act), it is arguably “no longer possible for the [New Zealand parliament] to invoke a logically prior legislative power, provided in the Act of 1947, to impose manner and form restrictions on itself”. F.M. Brookfield, “Kelsen, the Constitution, and the Law”, 15 *New Zealand Universities Law Review* 163 (1992) at 171.

chamber could be abolished.<sup>74</sup> In his opinion at the High Court of Australia, Justice Stark expressed that as a sovereign entity, the “Imperial Parliament cannot bind itself”, but the “Parliaments of the Dominions or Colonies are not sovereign and omnipotent bodies”.<sup>75</sup> The extent of the powers of these assemblies, he wrote, is determined by the Imperial Act that created them, and the “greater the constituent powers granted [to the assembly], the clearer...its authority to fetter its legislative power, to control and make more rigid its constitution”.<sup>76</sup> Under this view, an assembly that derives its power from an act of another body may be given the power to cease to be sovereign, while a truly sovereign assembly (an assembly whose powers are ‘original’), can never deprive itself from its constituent omnipotence.

As we will see shortly, the implicit depiction of the Imperial Parliament as an ‘original’ power negates an important part of the doctrine of the constituent power of the people. That doctrine rests on the idea that the people, somehow, constituted Parliament and, naturally, had a power superior to it. In this respect, it is interesting to note that although the provisions at issue in *Trethewan*, as well as in the later case of *Clayton v. Heffron*<sup>77</sup>, opened the possibility for ‘the people’ to have a say on important constitutional changes, this did not play a significant role in the discussion. The ‘people as constituent power’ was seen as a legally irrelevant category, with some arguing that the need to seek the approval of an “external body”, acted as a “limitation on [the] constituent power” of the legislature.<sup>78</sup> The conception of constituent power that will be examined in the next section, in contrast, presented the people, the ‘constituent body’, as the only legitimate bearer of the ultimate constitution-making power.

### III. Constituent Power and the Right to Instruct Representatives

The idea that electors have a right to instruct representatives (and that representatives have a corresponding duty to obey those instructions)<sup>79</sup> is not, by itself, a conception of constituent

<sup>74</sup> *Attorney General for the State of New South Wales and Others v. Trethewan and Others*, 44 C.L.R. 394 (1931).

<sup>75</sup> At 422.

<sup>76</sup> At 423. According to the High Court of Australia, Section 5 of the *Colonial Laws Validity Acts 1865* conferred “constituent powers” upon the colonial legislatures (see *Clayton v. Heffron* 105 C.L.R. 214 (1960)).

<sup>77</sup> *Clayton v. Heffron*, 105 C.L.R. 214 (1960).

<sup>78</sup> Goldsworthy, fn. 26 above, at 175. Keith, *The Sovereignty of the British Dominions*, fn. 22 above, at 205.

<sup>79</sup> It is not necessary to engage here in a survey of different views as to the binding character of instructions. Suffice to say that while, in the long run, the view that instructions are not binding prevailed, some instructions were sometimes issued in a language that suggested that representatives had no choice but to obey them. An example is provided by a set of instructions issued by the City of Bristol in 1701, which began with the preface

power. That is, it does not refer specifically to a constitution-making faculty, but to the power to influence or determine the content of the ordinary and fundamental laws adopted by an elected assembly. It is, in short, a view of the electors as possessors of a “co-legislative power” that survives the election of a set of representatives.<sup>80</sup> I include it here as a conception of constituent power because, combined with the following three features, it rests on the idea that the people constituted, and retains the right to re-constitute, the institutions that govern them. First, defenders of the right to instruct representatives sometimes referred to the electors as the ‘constituent powers’, and more frequently, as the ‘constituent body’ (this last phrase was sometimes used to refer to the entire people, and sometimes to the electors of a particular locality).

Second, the right to instruct representatives was sometimes connected to the right of the electorate to decide on the content of the constitution in ways that limited Parliament’s constituent jurisdiction, and was seen as particularly relevant in the context of fundamental constitutional change. Finally, some early commentators suggested that a parliament that repeatedly ignored the instructions given by the electorate triggered the community’s right of resistance and its power to create a new government. In England, the idea that electors are superior to those who sit in the representative body was famously expressed by groups such as the Diggers and Levellers during the 17<sup>th</sup> century. For example, Gerrard Winstanley’s proposal for annual parliaments came accompanied by a depiction of representatives as responsible to “their masters, the people who chose them”.<sup>81</sup> In the words of Edward Gee of Eccleston, writing in 1650, “the power of the “Constitutors” was “beyond the power of the constituted”.<sup>82</sup>

By the 18<sup>th</sup> century it was common for individual electors to identify themselves (and be identified by state officials) as ‘constituents’, and for the electorate to be designated as the ‘constituent body’. In 1740, for instance, the *London Magazine* published the “Proceedings of the Political Club”, reporting that a participant insisted that upon a new election, “every Constituent has a Right, and is in Duty bound, to inquire into the past Conduct of the

<sup>80</sup> “it is no doubt to us that we have a right to direct our Representatives”, and then stated, “We do direct and require you”. *The Electors Right Asserted with the Advices and Charges of Several Counties, Cities and Burroughs in England to their Respective Members of Parliament* (London, 1701) at 2, 13.

<sup>81</sup> “Address of the Mechanics of New York City, June 14, 1776” quoted in Gordon Wood, *The Creation of the American Republic: 1776-1787* (Chapel Hill and London: The University of North Carolina Press, 1998) at 366.

<sup>82</sup> Gerrard Winstanley, “The Law of Freedom in a Platform” (1652) (Chapter III).

<sup>82</sup> Edward Gee, *An Exercitation concerning Usurped Power* (n.p. 1650) at 8.

Representative, in order to determine whether he ought to trust him a second Time".<sup>83</sup> Some years later, in 1770, a contributor to the *London Evening Post*, writing to the "Freeholders of the County of Durham", expressed that "the sentiments of the constituent body should uniformly be the sentiments of their representatives".<sup>84</sup> Once the 'constituent body' is presented as having a power superior to that of the constituted legislature, the idea that the former has the faculty of instructing the latter naturally follows.

Statements like the following, made in 1778 in a document that denounced the seven year parliamentary term as "a long time to live in slavery"<sup>85</sup>, thus come as no surprise: "Instructions, therefore, when given by the constituent body, are directions, or orders, which it is the province of the representative body to act under".<sup>86</sup> The same writer argued that the "constituent body has a constitutional right, on all occasions, to direct their representatives in the form of written instructions", and "to declare their general opinion in such form and manner as they shall think proper and that to such general opinions the inferior powers of the constitution must submit".<sup>87</sup> The duty to obey would not destroy the "dignity of parliamentary service", he added, "because it cannot be supposed, that even the constituent body will ever interfere, except in case of great national concern...".<sup>88</sup>

In fact, the right to instruct representatives was seen as particularly offended when Parliament intended to enact statutes of constitutional significance without the support of the people. This is why those who opposed the Treaty of Union between England and Scotland (1706) maintained that "the Members of Parliament had *no Right* to alter the Constitution, without the Consent of their *Constituents*".<sup>89</sup> Rather, "Parliament ought to have an Adjournment for some time, that the Members might go down to the several and respective Countries, which they represented, and know the Mind of their Constituents", and obtain instructions from them.<sup>90</sup> In a similar manner, and in the months before the general election of 1780, a Sub-

<sup>83</sup> *The London magazine and Monthly Chronologer*, MDCCXL (February 1740) at 57.

<sup>84</sup> *London Evening Post*, March 29, 1770 (Issue 6614).

<sup>85</sup> See also "Argument and Authorities to Prove the Duty of Representatives to obey the Instructions of Constituents", *The Hibernian Magazine*, Vol. 4, December 1774, at 696-697.

<sup>86</sup> *Gazetteer and New Daily Advertiser*, Tuesday, January 6, 1778 (Issue 15 256).

<sup>87</sup> *Gazetteer and New Daily Advertiser*, Tuesday, January 6, 1778 (Issue 15 256).

<sup>88</sup> *Gazetteer and New Daily Advertiser*, Tuesday, January 6, 1778 (Issue 15 256).

<sup>89</sup> Daniel Defoe, *A Collection of Original Papers Concerning the Union Between England and Scotland* (Printed for E. Currill: London, 1709) 21-22.

<sup>90</sup> At 21-22. This does not mean that an election of a new Parliament was necessarily seen as a reflection of the wishes of the constituent body. As noted in an address by the Yorkshire association (which favoured the dissolution of Parliament in early 1784): "Imperfect as...an appeal to the Constituent Body must ever be, under

Committee of Westminster issued a report that found that “frequent parliaments were the fundamental constitution of the kingdom”, and that past alterations of the parliamentary term “were made without communication with the constituent body of the people, and have been continued without the sanction of their approbation”.<sup>91</sup> Moreover, the report stated that “the City of London, and other respectable bodies, continued to instruct their representatives” to repeal the Septennial Act (which, it was stated, was opposed by some in Parliament as “a flagrant breach of trust towards the constituent body”).<sup>92</sup>

That same year, Lord Carysfort wrote in a letter to the Huntingdonshire Committee that it is not an “unreasonable expectation that the representative body should comply with the declared sense of the nation, upon points respecting their natural and inherent rights”.<sup>93</sup> The fact that the right to instruct representatives was frequently seen as especially relevant in the context of constitutional change is not surprising. Since the Westminster Parliament may be conceived as a constituent assembly in permanent session, it is only natural to find proposals that would have given the electorate (as the ‘true’ constituent power)<sup>94</sup> a direct role in determining the validity of fundamental constitutional changes. After all, contemporary constituent assemblies are normally seen as acting on a commission by the people, which is why their work sometimes needs to be directly ratified by the electorate before coming into effect (even Emmanuel Sieyes, who attributed extraordinary representatives with the same powers as individuals in the state of nature, reminded them that they act “on an extraordinary mandate from the people”).<sup>95</sup>

In North America, the connection between instructions and constitution-making was also stressed by some politicians and commentators. As Gordon Wood explains, by the 18<sup>th</sup>

the present manifold defects of our National Representation...we still conceive the calling of a New Parliament to be the only true Constitutional Measure”. Cited in George Stead Veitch, *The Genesis of Parliamentary Reform* (London: Constable, 1913) at 98.

<sup>91</sup> “Report of the Sub-Committee, appointed to enquire into the State of Representation in this Country, Free-Masons Tavern, March 19, 1780”, *Morning Chronicle and London Advertiser*, Saturday, March 25, 1780 (Issue 3386). See also *The Correspondence of the American Revolution*, Vol. IV (Jared Sparks ed.) (Boston: Nathan Hale and Gray & Bowen, 1829) at 460-462.

<sup>92</sup> At 460-462.

<sup>93</sup> *A Letter from the Right Honourable Lord Carysfort to the Huntingdonshire Committee* (London: Printed for J. Almon, 1780) at 16.

<sup>94</sup> Dicey provided support to the view that the electorate should have a direct role in the adoption of laws of constitutional significance when he proposed the adoption of a *Referendum Act*, which would reflect the idea that “the nation is sovereign” and that “the constitution shall not be changed without the direct sanction of the nation”. A.V. Dicey “The Referendum”, 23 *National Review* 65 (1894) at 65.

<sup>95</sup> Emmanuel Sieyes, *What is the Third Estate?* (New York: Praeger, 1963) at 131.

century “some Americans had come to believe that it was precisely on [questions] such as the formation of governments or the disestablishment of religion, rather than on the most parochial questions, that binding instructions were more necessary”.<sup>96</sup> While this conception brings to the surface the strong links between the right to instruct representatives and the power to constitute government, at one level it sits uncomfortably with the idea of the constituent power *of the people*. That is, the right to instruct representatives came accompanied by a conception of the representative as an agent of those who elected her and, as a result, had a fundamentally local character.<sup>97</sup> Accordingly, some agreed that when the matter “related to the interest of the Constituents [of a certain constituency] alone”, the representatives were bound to obey instructions, but were the matter “was to affect the whole Community, Reason and Good Conscience should direct”.<sup>98</sup>

Nevertheless, there were ways for a number of counties, or for the entire constituent body, to try and force representatives to adopt particular policies. One of the earliest examples is a document distributed among different constituencies in the context of the campaign for the Convention Parliament of 1660 (in the hope that the constituencies would then send it to the relevant candidates), which among other things, would have “require[d]” candidates to restore “the antient Constitution”.<sup>99</sup> Interestingly, the disobeying of the instructions of the ‘constituent body’ was frequently cited as a reason for particular communities seeking the dissolution of Parliament. For example, in 1784, the “aggregate Body of the Citizens of Dublin at Tholfel” issued an “Address to the People of Ireland” denouncing the state of representation in the House of Commons and praying the Crown for its dissolution as “all confidence in Parliament and the dignity thereof destroyed; the trust of representation betrayed; the instructions of the constituent body disobeyed...”.<sup>100</sup>

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<sup>96</sup> Wood, fn. 80 above, at 191. See also Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York and London: W.W. Norton & Company, 1989) at 230.

<sup>97</sup> This presented a problem in light of the conception of representation that had already developed in the 17<sup>th</sup> century, according to which members of Parliament, while chosen from particular localities, “are not strictly and properly obliged to give account of their actions to any, unless the whole body of the Nation for which they serve, and who are equally concerned in their resolutions, could be assembled”. Algernon Sidney, *Discourses Concerning Government*, Vol. 2 (Edinburgh: Printed for G. Hamilton & J. Balfour, 1750) at 370. For a discussion, see Morgan, fn. 96 above.

<sup>98</sup> Debates of Virginia House of Burgessess, Oct. 1754. Cited in Wood, fn. 80 above, at 191.

<sup>99</sup> The document is contained in its entirety as ‘Appendix II’ in Cecil S. Emden, *The People and the Constitution: Being a History of the Development of the People’s Influence in British Government* (Oxford: Clarendon Press, 1956). Other examples are provided in Wood, fn. 79 above, at 369-37 and Morgan, fn. 96 above, at 212..

<sup>100</sup> “Address to the People of Ireland, Agreed upon by the Aggregate Body of the Citizens of Dublin and Thofel, on Monday the 21<sup>st</sup> of June, 1784”, *Morning Herald and Daily Advertiser*, Wednesday, June 30, 1784 (Issue

Others, of somewhat more radical persuasions, took this idea further and suggested that the people's right of resistance was triggered by the frequent disobedience of instructions. Thus, in a letter dated 3 April 1770 (in which the term 'constituent powers' replaced the term 'constituent body'), Junius maintained that "The House of Commons are only interpreters, whose duty it is to convey the sense of the people faithfully to the Crown. If the interpretation be false or imperfect, the constituent powers are called upon to deliver their own sentiments".<sup>101</sup> And then he added what seemed as a veiled threat: "Perplexed by sophistries, their honest eloquence rises into action...The last argument of the people, whenever they have recourse to it, will carry more perhaps, than persuasion to parliament, or supplication to the throne".<sup>102</sup> In 1791, a writer who also signed as Junius (and that was clearly influenced by the recent events in France)<sup>103</sup>, denounced the House of Commons for having disobeyed instructions from the people by not passing a bill that would have abolished slave trade: "I say, are these things to be endured? It is with you, as the constituent power, to say No."<sup>104</sup>

A similar conception was expressed in North America by Thomas Young, in the letter identified by Adams as the earliest instance of the use of the term 'constituent power'.<sup>105</sup> The purpose of Young's letter was to support Vermont's secession from New York. He encouraged the inhabitants of Vermont to send delegates to the Continental Congress, and to adopt a constitution modelled after the Pennsylvania Constitution of 1776, with one alteration.<sup>106</sup> It is in this context that the mention of the term constituent power (which, as in Junius' letter, had replaced the term 'constituent body') occurred: Young did not think the executive, unlike under the Pennsylvania Constitution, should be given a veto power over bills approved by the legislature, since he "esteem[ed] the people at large the true proprietors

<sup>1147).</sup> See also *London Magazine, Enlarged and Improved*, Vol. 1 (London: Printed for R. Baldwin, Pater-Noster-Row, 1783) at 481.

<sup>101</sup> Junius: *Stat Nominis Umbra*, Vol. 2, Letter XXXII (3 April 1770) (London: Printed for Henry Sampson Woodfall, 1772) at 18.

<sup>102</sup> At 18.

<sup>103</sup> The author explicitly referred to the French National Assembly and to the views of Mirabeau.

<sup>104</sup> "An Expostulatory Address to the People of England on the Late Memorable Decision Against the Abolition of the Slave Trade", *The Gentleman's Magazine, and Historical Chronicle*, Vol. 61, Part 1 (1791) at 537.

<sup>105</sup> Adams, fn. 1 above.

<sup>106</sup> For a discussion, see Pauline Maier, "Reason and Revolution: The Radicalism of Dr. Thomas Young", *American Quarterly*, Vol. 28(2) (Summer, 1976) at 234-235.

of governmental power. They are the supreme constituent power and, of course, their immediate representatives are the supreme delegate power".<sup>107</sup>

The idea, as explained by Zadock Thompson (editor of a book in which the letter was published), "was that the whole legislative power should be vested in the immediate representatives of the people -that the governor and executive council should have the power to advise, but should have no power to negative the acts of the representatives."<sup>108</sup> What we see here, then, is not a reference to the term 'constituent power' as referring to a specific constitution-making faculty, but to the power to determine the content of ordinary laws. For Young, it was not appropriate to allow the executive to veto the acts of the legislature; the latter possessed a higher authority as it acted by delegation of the 'supreme constituent power'. Nevertheless, and this is where Young's implicit support of the rationale behind the right to instruct representatives becomes entangled with the right of resistance (by then very popular in North America): "[A]s soon as the delegate power gets too far out of the hands of the constituent power, a tyranny is in some degree established".<sup>109</sup> As will become clear in the next section, this reference to tyranny brings Young closer to Lawson and Locke, as it suggests that if the representatives continually disobey the constituent body, the latter have a justifiable claim to remove them from office (by vote or revolution).

According to Morgan, the idea that the people had a right to instruct representatives and that the representatives were bound by those instructions, "reached its high point in England at the election of 1774, when radical Whigs in London and Westminster sought to exact pledges from candidates to obey any instructions" given to them.<sup>110</sup> This attempt (which prompted Edmund Burke's famous letter)<sup>111</sup> failed, as only a handful of candidates agreed to subscribe the pledge. Notwithstanding the above, the right to instruct representatives has survived in different forms. It was not only recognized in 18<sup>th</sup> century U.S state constitutions<sup>112</sup>, but it is still present in the form of the popular initiative for the adoption of laws and in some cases

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<sup>107</sup> "Dr. Young's Letter" in Zadock Thompson, *History of Vermont: Natural, Civil, and Statistical in Three Parts, with a New Map of the State and 200 Engravings* (1842) at 106.

<sup>108</sup> At 106-107.

<sup>109</sup> At 106-107.

<sup>110</sup> Morgan, fn. 96 above, at 215.

<sup>111</sup> Edmund Burke "Speech to the Electors of Bristol" (3 November 1774), *The Works of the Right Honourable Edmund Burke*. 6 vols. (London: Henry G. Bohn, 1854-1856), Vol. 1, at 446-448.

<sup>112</sup> See for example, the Constitution of Massachusetts (Article XIX, Part I, 1780), Constitutions of North Carolina (Section 17, 1776) and Pennsylvania (Section 16, 1776), which explicitly referred to the people's right to instruct representatives.

constitutional amendments. The popular initiative, like the right to instruct representatives, rests on the idea that the people has a co-legislative power that is not exhausted in the election of a representative assembly.

For example, the current constitution of Maine states in Section 15 of its Declaration of Rights that “The people have a right at all times in an orderly and peaceable manner to assemble to consult upon the common good, to give instructions to their representatives”. And its Section 18(2) -Article IV (“The Legislative Power”)-, establishes a procedure for exercising that right, providing 10% of the electors with the ability of proposing a bill which “unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to the electors...”. Article 18 of the Constitution of California -as well as the national constitutions of countries belonging to different constitutional traditions-<sup>113</sup> takes this approach further, allowing the adoption of constitutional amendments through a similar procedure. Some national constitutions in Latin America provide the people with the right not only of adopting new laws or constitutional amendments through popular initiative, but also to require government to convene constituent assemblies commissioned with the task of adopting new constitutional orders.<sup>114</sup>

#### **IV. Constituent Power and the Right of Resistance**

The right to resist authority –understood not only as a right to disobey but as a right to create a new form of government- is frequently associated with the concept of constituent power. Unlike contemporary commentators, the most famous proponents of the right of resistance did not use the term ‘constituent power’ to refer to the community’s ability to re-constitute government in cases of grave abuses. They were nevertheless aware that in order to defend the people’s right of resistance, a distinction needed to be made between the power of making ordinary rules, and the power of altering the rule-making framework itself. What makes the conception of constituent power *as a* right of resistance particular (and different, for example, to the one developed in revolutionary France) is that it presents constituent power as a power that can only be exercised in certain occasions. In other words, the constituent subject does not possess the ability to engage in fundamental constitutional change at any moment, but only after the occurrence of abuses of power on the part of the governors.

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<sup>113</sup> The most obvious examples would be that of the Constitution of Uruguay (1967, Article 331) and the Constitution of Switzerland (1874, Article 121).

<sup>114</sup> The popular initiative to convene a Constituent Assembly will be briefly discussed in Part V of this article.

The idea that subjects have the right to resist abuses of power has been traced back to religious debates during the early Middle Ages, where radical elements in the church frequently argued that even if the Pope had “plenitude of power”, if he persistently gave heretical teachings, the cardinals and bishops in council could exercise a superior authority and judge him (others argued that by behaving in an heretical way, he would automatically forfeit the papacy).<sup>115</sup> It is in fact difficult to examine this conception of constituent power without a reference to religion. God, after all, was seen well after the Middle Ages as an ultimate constituent power that, if necessary, might intervene in politics to save his subjects. The Fifth Monarchists, for example, expected the direct intervention of the Son of God in 17<sup>th</sup> century English politics so that a just form of government could be established.<sup>116</sup>

One common explanation for attributing this power to God, provided in this case by Johannes Althusius -relying on biblical sources- was that “God made Adam master and monarch of his wife, and of all creatures born or descendant from her. Therefore, all power and government is said to be from God” (even if God could temporarily place that power in the community).<sup>117</sup> Some years later, this idea was put in the language of constituent power. Writing in 1644, John Maxwell (a defender of absolute monarchy and critic of the people’s right of resistance) expressed concern that “If the people, the constituent, be more excellent than the effect, and so the people [are] above the King, because they constitute the King”, then all rules could be made void by them.<sup>118</sup> For Maxwell, “the efficient and constituent cause is God and the people is only the instrumental cause”.<sup>119</sup> It was not to the people, but to God, that Kings were ultimately responsible, so “no power on earth can unmake them”.<sup>120</sup>

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<sup>115</sup> Tierney, *Religion and the Growth of Constitutional Thought*, fn. 27 above, at 14, 17, 18. Different versions of the right of resistance were developed in 16<sup>th</sup> century France, the most notable of which included *Vindiciae Contra Tyrannos*. For a discussion, see Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) at 64-65. See also Julian Franklin (ed.), *Constitutionalism and Resistance in the Sixteenth Century: Three Treatises by Hotman, Beza and Mornay* (New York: Pegasus, 1969).

<sup>116</sup> Christopher Hill, *The World Turned Upside Down: Radical Ideas During the French Revolution* (England: Penguin Books, 1991) at 72.

<sup>117</sup> Johannes Althusius, *Politica: Politics Methodically St Forth and Illustrated with Sacred and Profane Examples* (Indianapolis: Liberty Fund, 1995 [1614]) at 20. A similar argument was advanced by William of Ockham in the 14<sup>th</sup> century. See Brian Tierney, *The Idea of Natural Rights* (Scholars Press for Emory University, 1997) at 172.

<sup>118</sup> John Maxwell, *Sacro-Sanctum Regus Majestas* (1644), quoted in Samuel Rutherford, *Lex, Rex: The Law and the Prince* (London: Printed for John Field, 1644) at 151.

<sup>119</sup> At 146.

<sup>120</sup> At 146.

In response, Samuel Rutherford insisted that “the constituent is above that which is constituted”, that the people “give to the king a politic power for their own safety”, and that they had the right to resist that power in cases of abuses such as the “destruction of laws, religion, and the subjects”.<sup>121</sup> Around the same time in the 17<sup>th</sup> century, George Lawson maintained that certain governmental abuses “offend God” and that, as a result, in some cases God “stirs up” the people to rebel and to exercise their right to resist.<sup>122</sup> From the perspective of a social contract theorist like Lawson, the question that constituent power, as a right of resistance, serves to answer is: Can those living under a form of government that arose as a result of a covenant repudiate that covenant and create a new and different juridical order? Thomas Hobbes had given a very clear answer: those who have already “constituted” a sovereign “cannot lawfully make a new Covenant amongst themselves to be obedient to any other”,<sup>123</sup> Lawson (as John Locke after him)<sup>124</sup> disagreed with Hobbes on this point: in cases of extreme governmental abuse, the people’s original right to constitute a Commonwealth may be exercised again.<sup>125</sup>

In his *Politica Sacra et Civilis*<sup>126</sup>, published in 1657 (six years after the first edition of *Leviathan*), Lawson made the bold theoretical move of placing sovereign power in the community rather than in a constituent parliament or a constituent prince.<sup>127</sup> For Lawson, the ordinary law-making power was limited in important ways by the obligations imposed by the social contract, and breaching those limits always involved the risk of awakening the real sovereign power of the community. Real majesty, as Lawson identified that sovereign power, was defined as the “power to constitute, abolish, alter, [and] reform forms of government”.<sup>128</sup> Real majesty was inalienable (for Lawson the people’s sovereignty was not ‘self-embracing’), and was to be distinguished from personal majesty, which included the ordinary

<sup>121</sup> At 152, 151, 261. Rutherford sometimes used the terms ‘people’ and ‘Parliament’ as equivalents, so his defence of the constituent people frequently amounted only to a defence of the supremacy of Parliament above the King. At 144. Rutherford, nevertheless, maintained the superiority of the people over Parliament.

<sup>122</sup> George Lawson, *Political Sacra et Civilis* (Cambridge: Cambridge University Press, 1992) at 69.

<sup>123</sup> Thomas Hobbes, *Leviathan* (Penguin Books, 1968) at 229.

<sup>124</sup> For an early discussion of the similarities between Lawson and Locke, see A.H. Maclean, “George Lawson and John Locke”, 9 *Cambridge Historical Journal* 69 (1947).

<sup>125</sup> Similar views were advanced by others during the 17<sup>th</sup> century. See for example William Bridge, *The Wounded Conscience Cured* (B. Allen, 1642).

<sup>126</sup> Lawson, fn. 122 above.

<sup>127</sup> Julian H. Franklin, *John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution* (Cambridge: Cambridge University Press, 1978) at 69.

<sup>128</sup> Lawson, fn. 122 above, at 316.

law-making power, “the power of a commonwealth already constituted”, which was exercised in England by the two houses of Parliament and the King.<sup>129</sup>

Although Lawson attributed the community with the power to constitute government, with a constitution-making power, he limited the possibilities of exercising it to instances in which government abused its law-making faculties: “[a]s the community hath the power of constitution, so it hath of dissolution, *when there shall be a just and necessary cause*”<sup>130</sup>. Lawson thus denounced the ideas of those radicals who suggested “that those who may constitute may set aside”, that is, that the community had the power to create a new government whenever it wished.<sup>131</sup> A multitude of subjects, insisted Lawson, could not get together and simply decide they wanted to alter or abolish the constitution for, as subjects, they had voluntarily submitted to obey the “laws once made, or suffer.”<sup>132</sup> But when the conditions on which personal majesty is held are transgressed, such as cases of “negligence, imprudence, injustice, oppression, and other such like sins”,<sup>133</sup> the obligation to obey terminates and all authority reverts back to the community.<sup>134</sup>

Placing himself at odds with latter formulations of parliamentary sovereignty, Lawson was very clear on this point. He agreed with Sir Roger Owen, who thought that there were things even Parliament could not do, such as changing the form of the polity from a monarchy to a democracy.<sup>135</sup> In fact, some of Lawson’s statements are early formulations of the doctrine of constitutional supremacy: “The form of government was first constituted by the community of England, not by the parliament. For the community and people of England gave both king and parliament their being: and if they meddle with the constitution to alter it, they destroy themselves...”.<sup>136</sup> Anticipating the Convention Parliament of 1689 (and the constitutional conventions of 18<sup>th</sup> century North America), Lawson maintained that once government was dissolved, the community could make use of the existing parliament to exercise its real

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<sup>129</sup> At 316.

<sup>130</sup> At 316. (Emphasis added).

<sup>131</sup> At 48.

<sup>132</sup> At 52.

<sup>133</sup> At 69.

<sup>134</sup> At 68. See also Franklin, fn. 127 above, at 72.

<sup>135</sup> At 107

<sup>136</sup> At 107.

majesty, “but this cannot be as a parliament, but considered under another notion, as an immediate representative of a community, not of a commonwealth.”<sup>137</sup>

Like Lawson, Locke thought that “the people alone can appoint the form of the commonwealth, which is by constituting the legislative and appointing in whose hands that shall be”.<sup>138</sup> When government breaches the people’s trust (for example, by invading the natural rights of individuals), it dissolves and power “devolves to the people who have a right to resume their original liberty”.<sup>139</sup> This, maintained Locke, would usually happen only after “a long train of abuses, prevarications, and artifices”.<sup>140</sup> In the normal situation where government is still in place, however, parliament is to be considered the supreme power, for it has a superior power to adopt laws that bind all subjects.<sup>141</sup> Like Lawson, Locke was at pains to show that even if it is true that the people as a whole is the real supreme power, it cannot be considered as such “under any Form of Government,” because “this power of the people can never take place till the government be dissolved” (he nevertheless maintained that where there was a question about whether government should be dissolved, “the people shall be judge”).<sup>142</sup>

Lawson’s and Locke’s conception of the people’s faculty of exercising constituent power as depending on a set of previous governmental abuses is reflected in the founding document of the American Revolution: “[W]henever any Form of Government becomes destructive of these ends [‘that all men are created equal, that they are endowed by their Creator with certain unalienable Rights’] it is the Right of the People to alter or to abolish it, and to institute new Government.”<sup>143</sup> Echoing Locke’s literal words, the same document established: “[W]hen a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce [the people] under absolute Despotism, it is their right, it is their duty, to throw off such Government...”<sup>144</sup> This limitation on the exercise of constituent power was famously expressed by Benjamin Rush in 1787 when he wrote that the people could not

<sup>137</sup> At 47. For a discussion see Steve Pincus, *1688: The First Modern Revolution* (New Haven: Yale University Press, 2009) at 282-284.

<sup>138</sup> John Locke, *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus* (Peter Laslett ed.) (Cambridge: Cambridge University Press, 1967) at 193, para. 141.

<sup>139</sup> At 235, paras. 225, 233, 222.

<sup>140</sup> At para. 225.

<sup>141</sup> At 197, para. 155. See also Carl Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (New York: Blaisdell Publishing Company, 1950) at 130.

<sup>142</sup> Locke, fn. 138 above, at 197, para. 149; at p. 245, para. 240.

<sup>143</sup> *Declaration of Independence* (1776).

<sup>144</sup> *Declaration of Independence* (1776).

“exercise or resume” sovereign power, “unless it is abused”.<sup>145</sup> As will be recalled, a similar right was attributed to the Crown with respect to colonies which, after being granted a constitution, had a government incapable of protecting its people. In those situations of emergency, the Crown regained its constituent power.

This conception of the right of resistance is reflected in the constitutional arrangements of most modern constitutional states. Most of the world’s written constitutions include amendment formulas that allow government, and not the people acting through special conventions (that is, the traditional means through which ‘new forms of government’ are supposed to be established)<sup>146</sup>, to alter the fundamental law. This is the case, for example, of the Constitution of Spain, which places the amending power in legislative supermajorities and does not provide the electorate with the formal ability to trigger episodes of constitutional change.<sup>147</sup> Under this typical constitutional framework, the exercise of the constituent power of the people becomes a one-off activity, something that might have happened when the constitution was originally created but that it is not supposed to happen again except in the context of a political revolution and the overthrowing of the juridical order.

Contemporary commentators frequently present Lawson and Locke as theorists of constituent power without distinguishing their conception from the more radical idea that the people do not need to provide any moral justification before engaging in constituent activity. For example, John Rawls, explicitly endorsing Locke, has written that “[The] constituent power of the people sets up a framework to regulate ordinary power, and it comes into play only when the existing regime has been dissolved”.<sup>148</sup> Julian Franklin, too, notes that in Locke (as in earlier constitutional theory), “the right of resistance and deposition had also been based on

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<sup>145</sup> Benjamin Rush, “Address to the People of the United States” (1787), *The Documentary History of the Ratification of the Constitution*, vol. 13 (Wisconsin Historical Society Press, 2008) at 46.

<sup>146</sup> Gordon Wood has traced this idea back to 17<sup>th</sup> century England, where Convention Parliaments (parliaments not summoned by the King), by being elected with the specific purpose of engaging in important constitutional transformations, were seen by some as being somehow closer to the people. One of the main implications (and for their proponents, advantages) of creating a constitution through a special convention, as suggested by the Levellers in *The Case of the Army Truly Stated*, was that a fundamental law “unalterable by parliaments” would be produced. John Wildman, *The Case of the Army Truly Stated* (London: [s.n.], 1647). For a comprehensive study of constitutional conventions in the United States, see Roger Sherman Hoar, *Constitutional Conventions: Their Nature, Powers, and Limitations* (Boston: Little, Brown, & Company, 1917).

<sup>147</sup> Constitution of Spain (1978), Articles 166-168. A ratificatory referendum is required in certain cases.

<sup>148</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005) at 231. See also John Rawls, *Lectures on the History of Political Philosophy* (Cambridge, MA: Harvard University Press, 2007) at 122, 124, 135-136.

the constituent power of the people".<sup>149</sup> More recently, Richard Kay has maintained that Lawson and Locke advanced versions of the idea of constituent power pre-dating the French Revolution, but without noting that the former conception, unlike the latter, required repeated governmental abuses before constituent power could be legitimately exercised.<sup>150</sup> The problem of proceeding in this way is that one obscures the fact that Lawson's and Locke's theories of resistance can easily sit within a traditional liberal constitutional framework, while the French conception, if taken literally, mandates a constitutional order of radically democratic leanings.

The constitution-makers in the American thirteen colonies were heavily influenced by Locke and, not surprisingly, adopted provisions recognising the right to revolution (some of which survive up to this day). For example, the Constitution of Virginia of 1776 stated that when government was unable to promote the "common benefit, protection and security of the people, nation or community...", "a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal".<sup>151</sup> Some later constitutions contained similar language, but the conditions in which the right of resistance could be exercised were somewhat relaxed. For instance, the Constitution of Ohio, adopted at the beginnings of the 19<sup>th</sup> century, stated that in order to secure their rights, the people "have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary".<sup>152</sup> These constitutions came close to implementing a conception of constituent power very similar to the one developed during the French revolution. To that fifth conception of constituent power I turn below.

## V. Constituent Power as Popular Sovereignty

This final conception of constituent power is the best known of all and it is routinely associated with the work of Emmanuel Sieyes.<sup>153</sup> Sieyes articulated a theory of the people's

<sup>149</sup> Franklin, fn. 127 above, at 1. See also Julie Mostov, *Power, Process, and Popular Sovereignty*, Philadelphia: Temple University Press, 1992.

<sup>150</sup> Richard S. Kay, "Constituent Authority", *American Journal of Comparative Law*, Vol. 59(3) (2011) at 3-4.

<sup>151</sup> Constitution of Virginia (1776), Bill of Rights, Section 3. Similar provisions can be found in the Constitutions of Massachusetts (1780, Preamble), the Constitution of New York (1777, Preamble).

<sup>152</sup> Constitution of Ohio (1802), Article VIII (Section 1). For a discussion, see Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (Cambridge: Cambridge University Press, 2008) at 28.

<sup>153</sup> For a discussion of this conception of constituent power, see Andreas Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power", 12 *Constellations* 223 (2005).

(or the nation's) constituent power that was free from the conditions imposed by earlier theories of resistance. His theory not only identified the people, the popular sovereign, as the only legitimate bearer of an absolute political power, but it was also based on a clear distinction between fundamental and ordinary laws. None of these ideas were by themselves original, but Sieyes was able to bring them together through his famous distinction between the constituent and the constituted powers (the former referring to an unlimited constitution-making faculty, and the latter to the powers that emerge from the constitution).

For Sieyes, the constitution was not “the creation of the constituted power, but of the constituent power”<sup>154</sup>, and it was up to the latter to decide whether to engage in future acts of constitution-making. In other words, after creating the constitution the nation could “neither alienate nor waive its right to will”, and regardless of the content of the constitution it created, it could alter it “as soon as its interests require”<sup>155</sup>. This was a view of the nation as the ultimate constitution-maker, a view that attributed to the people what Jean Bodin had earlier attributed to the sovereign prince.<sup>156</sup> The will of the nation, Sieyes wrote, “puts an end to positive law, because it is the source and the supreme master of positive law.”<sup>157</sup> Such an extraordinary power could express itself through any procedures deemed appropriate by the nation, but it would normally be exercised by a special body like a constituent assembly.<sup>158</sup>

No constitutional theorist has taken Sieyes' further than Carl Schmitt. Schmitt insisted in the absolute character of the constituent power and in the idea that rather than being exhausted in the act of constitution-making, constituent power continued to exist “alongside and above” the constitution.<sup>159</sup> However, Schmitt's theory came accompanied by the view, absent in Sieyes, that the constituted powers could not use the established procedures for constitutional amendments to legitimately alter -what he called- the people's “fundamental political

<sup>154</sup> Sieyes, fn. 95 above, at 124.

<sup>155</sup> At 127.

<sup>156</sup> For Bodin, the law of God and nature, as well as “laws which concern the state of the kingdom and its basic form”, “cannot be infringed by the prince”. Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (Julian Franklin ed.) (Cambridge: Cambridge University Press, 1992) at 13, 18. Sieyes maintained that “prior to and above the nation, there is only *natural law*”, so that some rights, as the right to property, could not be legitimately violated even by the constituent people. Moreover, he thought that the nation could never ‘alienate’ its will: it could not change the fact that it was sovereign (just as the prince could not infringe the basic form of a kingdom that recognised his sovereignty). Sieyes, fn. 95 above, at 124, 127.

<sup>157</sup> Sieyes, fn. 95 above, at 128.

<sup>158</sup> At 127, 130-131.

<sup>159</sup> Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008) at 126.

decisions".<sup>160</sup> These decisions, which were reflected in constitutional provisions that established the form of the state and the relationship of the government with its citizens, were *the 'Constitution'*, and needed to be distinguished from mere 'constitutional laws' (the proper object of the amending power).<sup>161</sup> Only a subsequent exercise of constituent power could replace the 'Constitution' with a new one.

Of course, the conception of constituent power as popular sovereignty did not appear in a vacuum, and there are a number of earlier theoretical and historical developments worth mentioning before considering the impact of this fifth conception in different constitutional traditions. In the 17<sup>th</sup> century, even those who maintained that all power originated from God, like Rutherford, sometimes contended that God "hath given the power of government originally, not to one, but to a multitude".<sup>162</sup> As J.P. Sommerville has explained, supporters of monarchy, such as Marc'Antonio De Dominis and Robert Filmer, contended that if that theory "were correct, communities could not lawfully alter their form of government, but would be obliged to suffer democratic rule forever".<sup>163</sup> The Spanish Jesuit Francisco Suarez had already given an answer to that objection in 1613: all societies were at first democracies, but God did not prescribe any form of government, so they were free to remain a democracy or to choose aristocracy or monarchy.<sup>164</sup>

These theoretical antecedents to the modern notion of popular sovereignty later played an important role in arguments that sought to justify the existence of limits to the powers of government, arguments that were sometimes presented in the language of constituent power. For example, in a 1769 essay, an anonymous contributor to the *London Magazine* wrote that "when the delegated power assumes an authority to destroy the primitive constituting power, it cannot be expected that the people will look quietly on", for "the whole legislative is

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<sup>160</sup> At 141. Even though Schmitt maintained that in a democracy, the people can be the only legitimate constituent subject, he also maintained that constituent power could rest in a monarch or in an aristocracy. Schmitt, *Constitutional Theory*, at 129.

<sup>161</sup> At 150-153.

<sup>162</sup> Samuel Rutherford, *The Due Right of Presbyteries or, A Peaceable Plea, For the Government of the Church of Scotland* (E. Griffin, 1644) at 340.

<sup>163</sup> J.P. Sommerville, *Royalists & Patriots, Politics and Ideology in England 1603-1640* (London and New York: Longman, 1999) at 26.

<sup>164</sup> Francisco Suarez, *Defensa de la Fe Católica y Apostólica Contra los Errores del Anglicanismo* (Instituto de Estudios Políticos, 1970). For a discussion, see Sommerville, fn. 163 above, at 61. See also Brian Tierney, *The Idea of Natural Rights* (Scholars Press for Emory University, 1997) at 172.

subordinate to the end for which the power was given, namely, the preservation of liberty".<sup>165</sup> As we saw in the previous section, similar ideas were already present in the theories of resistance advanced by various social contract theorists, as well as by supporters of Parliament in 17<sup>th</sup> century England.<sup>166</sup>

What is new in Sieyes' conception of constituent power is that it presupposed the (continued) existence of the social contract: it assumed that the people had already made their transition from the state of nature to civil society, but that they could give the commonwealth a new constitution whenever they thought appropriate. As Thomas Rutherford, writing in 1756, put it, one thing is to say that the people have a natural right to resist a government that has broken the social contract, and quite another to say that the "constitutional power of the people is necessarily superior to that of the governing body...merely upon account of their having been the original constituents of that body", because that would mean that the people could displace their governors "at pleasure".<sup>167</sup> One of the first formulations of the latter view can be found in the work of Althusius. Althusius believed that the right of sovereignty (to be distinguished from the right of administration), which God had placed in the whole body of the community, amounted to "a power of disposing, prescribing, ordaining, administering, and constituting everything necessary and useful for the universal association".<sup>168</sup> And what the community "has once set in order is to be maintained and followed, *unless something else pleases the common will*".<sup>169</sup>

Before the French Revolution had begun, a conception of popular sovereignty that shared these features appeared in North America. One of its clearest expressions can be attributed to James Wilson, who told the Pennsylvania Convention called to ratify the 1787 constitution that the people possessed "a power paramount to every constitution, inalienable in its nature,

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<sup>165</sup> "An Essay on Natural Liberty", *The London Magazine or, Gentleman's Monthly Intelligencer*, Vol. XXXVIII (1769) at 260. Some years earlier, Daniel Defoe expressed a similar idea when he wrote that "The Power vested in the Three heads of our Constitution is vested in them by the People of *England*, who were a People before there was such a thing as a Constitution". Daniel Defoe, *The Original Power of the Collective Body of the People of England, Examined and Asserted* (London, 1702).

<sup>166</sup> See for example, Henry Parker, *Observations upon Some of His Majesty's Late Answers and Expresses* (2<sup>nd</sup> ed. London, 1643) at 1.

<sup>167</sup> Thomas Rutherford, *Institutes of Natural law: Being the Substance of a Course of Lectures on Grotius De Jure Belli et Pacis* (Cambridge: Printed by J. Bentham, 1756) at 126-127.

<sup>168</sup> Althusius, fn. 117 above, at 70. An earlier, 14<sup>th</sup> century distinction between the power to create government and the power to adopt ordinary laws can be found in the work of William of Ockham. Tierney, fn. 27 above, at 51-52.

<sup>169</sup> Althusius, fn. 117 above, at 72 (emphasis added).

and indefinite in its extent".<sup>170</sup> Expressing a similar view but having absorbed the language of the French Revolution, some years later Thomas Paine wrote that "there ought to be, in the constitution of every country, a mode of referring back, on any extraordinary occasion, to the sovereign and original constituent power, which is the nation itself"<sup>171</sup>, and that "[e]very age and generation must be as free to act for itself, *in all cases*, as the ages and generations that preceded it".<sup>172</sup> Some U.S. state constitutions attempted to put into practice these ideas. For example, the Constitution of Montana referred to the people's unlimited constitution-making power and allowed the legislature and the electors (by popular initiative) to call an "unlimited convention to revise, alter, or amend" the constitution.<sup>173</sup> Other state constitutions followed Thomas Jefferson's advice<sup>174</sup>, requiring the calling of constitutional conventions at set period of times.<sup>175</sup> At the federal level, however, a different approach was followed.<sup>176</sup>

Although Article V of the U.S. Constitution contemplates the calling of a Constitutional Convention that could arguably engage in an exercise of constituent power,<sup>177</sup> it attributes the exclusive power to trigger that extraordinary body to a supermajority in Congress (after an application from two thirds of the state legislatures).<sup>178</sup> Not surprisingly, George Mason, who objected to the final text of Article V, complained that according to it "the whole of the people of America can't make, or even propose alterations" to the constitution.<sup>179</sup> Justice Marshall seems to have used the difficulty of convening such an assembly as part of the justification for the judicial power to strike down legislation. Thus, in *Marbury v. Madison*, he wrote that "the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness", but that "the

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<sup>170</sup> James Wilson, "James Wilson's Opening Address" in *Works of James Wilson* (James DeWitt Andrews ed.) (Chicago: Callaghan, 1896).

<sup>171</sup> Thomas Paine, "Address to the Addressers", *The Political Writings of Thomas Paine*, Vol. II (Charlestown: printed by George Davidson, 1824) at 308.

<sup>172</sup> Thomas Paine, "The Rights of Man" in *Common Sense and other Writings* (The American Heritage Series, 1953) at 87, 76. As is well known, this essay was not well received by many in England. See George Stead Veitch, *The Genesis of Parliamentary Reform* (Constable: London, 1913) at 179.

<sup>173</sup> Constitution of Montana (1889), Article XIV, Sections 1 and 2. See also Article 115 of the the French Constitution of 1793.

<sup>174</sup> See Thomas Jefferson, "Letter to Samuel Kercheval" (July 12, 1816) in Merrill D. Peterson (ed.) *The Portable Thomas Jefferson*, (New York: Penguin, 1975) at 560. See also Jean Jacques Rousseau, *The Social Contract and the Discourses* (Everyman's Library. 1973) at 269-270;

<sup>175</sup> See for example Article XIX, sec. 2 of the Constitution of New York (1938).

<sup>176</sup> For a discussion, see Jason Frank, *Constituent Moments: Enacting The People in Postrevolutionary America* (Durham: Duke University Press, 2010) at 24-33.

<sup>177</sup> For a discussion of the limited or unlimited character of an Article V Constitutional Convention, see Walter E. Dellinger, 'The Recurring Question of the "Limited" Constitutional Convention', 88 *Yale Law Journal* 1623 (1979).

<sup>178</sup> Article V, Constitution of the United States.

<sup>179</sup> Cited in Fritz, fn. 152 above, at 136.

exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated".<sup>180</sup> If the people cannot defend their constitution from the constituted powers of government through the episodic convocation of special constituent assemblies, it is only natural to conclude that someone else should do it for them, and courts are the most obvious alternative.<sup>181</sup>

In Latin America, the fifth conception of constituent power has played a central role in contemporary political and jurisprudential debates. In fact, Latin American courts are not shy to engage in bold definitions of the concept of constituent power. For example, in a 1990 case that, among other things, examined the scope of the power of a Constituent Assembly that was to be convened through a series of referendums (in violation of the then established procedure for constitutional amendments), the Supreme Court of Justice of Colombia stated that "Being the Nation the bearer of the original constituent power (*constituyente primario*)<sup>182</sup> and having a sovereign character from which the other public powers emerge...[N]either it is subject to any limits other than those imposed by itself, nor its acts can be revised by the constituted powers."<sup>183</sup> The constituent power was described by the court as a "moral and political potency," possessing a "creative vigor," and capable of "opening closed channels of expression."<sup>184</sup>

In 1999, a similar decision was rendered in Venezuela, where the country's highest court expressed that the procedure for constitutional amendments contained in the Constitution of

<sup>180</sup> *Marbury v. Madison*, 5 U.S. 136 (1803).

<sup>181</sup> A contemporary version of this formulation can be found in Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991).

<sup>182</sup> Latin American jurists (as some of their European counterparts) frequently recur to the distinction between "original constituent power" (*poder constituyente originario o primario*) and "derived constituent power" (*poder constituyente derivado o constituido*). The former refers to the unlimited power of the people to create a new constitutional regime, and the latter to the (arguably limited) power to reform the constitution according to the procedures created by the constituent subject. See for example Luis Sánchez Agesta, *Principios de Teoría Política* (Madrid: Editora Nacional, 1983). In France, although the distinction between original and derived constituent power is present, no limits on the amending power are recognised at the level of constitutional practice (apart from the general prohibition on the amendment of the republican form of government -Article 89(5)). Denis Baranger, "The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)", 44 *Israel Law Review* 389 (2011) at 400. The distinction between an 'original' and a 'derived' power was also present in discussions about the scope of the constituent power of colonial legislatures in the British Empire. See Part II of this article.

<sup>183</sup> Opinion No. 138, November 9th, 1990. A similar decision was taken by the Venezuelan Supreme Court in 1999. It should come as no surprise that some constituent assemblies frequently intrude in ordinary law making. This contrasts with the view of some 17<sup>th</sup> century Englishmen, who argued that special conventions had constitution-making powers but could not "exercise the legislative power". See J.W. Gough, *Fundamental Law in English Constitutional History* (Oxford: Clarendon Press, 1955) at 133.

<sup>184</sup> At 133.

1961 only applied to government and not to the people, for “the constituent power, [has] an absolute and unlimited character”, as it is “prior and superior to the established juridical order”.<sup>185</sup> At the same time, however, the theory of constituent power has been used by Latin American courts to limit government’s power of constitutional change (in a way highly reminiscent of Schmitt’s *Constitutional Theory*). The best example is a 2003 decision from the Colombian Constitutional Court, in which the court asserted its jurisdiction to declare constitutional amendments unconstitutional (even if they had been adopted according to the established amendment rule). Since the power to amend the constitution was by definition a *constituted* power, the court reasoned, it could be used to change any constitutional provision and even to engage in major constitutional reform, but “not to eliminate or substitute the existing Constitution with a different one, something that can only be done by the constituent power”<sup>186</sup>.

In this way, the court concluded that it was its duty to determine which constitutional changes are so fundamental that lie outside the jurisdiction of the constituted powers and, as such, could only be brought into existence by a new episode of constituent activity.<sup>187</sup> In practice, instead of giving constituent power an actual role in constitutional practice, this approach could lead to truly perpetual constitutions, constitutions with a ‘core’ that can never be legally amended, even in light of the clear support of a great majority of the electors (a Latin American version of common law constitutionalism). Some of the most recently adopted Latin American constitutions (those of Bolivia, Ecuador, and Venezuela) have attempted to provide a solution to that ‘problem’.<sup>188</sup> Those constitutions allow the electors, the constituent body, to convene sovereign constituent assemblies through popular initiative (i.e. through the collection of signatures) and to attribute these entities with the power to draft new constitutions that are then ratified through popular vote.<sup>189</sup>

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<sup>185</sup> Opinion No. 17, Fallo Núm. 17 of the Supreme Court of Justice of Venezuela, January 19, 1999. This type of reasoning is also present in some U.S. state decisions. For a similar reasoning by a U.S. state court, see *Wood's Appeal*. 75 Pa. 59 (1874). The case is discussed in Kay, fn. 150 above, at 17-18.

<sup>186</sup> Sentencia 551/03, July 9th, 2003.

<sup>187</sup> Interestingly, when the Protectorate Parliament attempted to amend the Instrument of Government in 1654, Cromwell objected, defending the existence of certain unalterable constitutional ‘fundamentals’ (which he characterised as “constitutive”). Speech made to the First Protectorate Parliament on 12<sup>th</sup> September 1654. Accordingly, David Lindsay Keir has explained that “It was in vain that the Protector reminded the Parliament of 1654 that it was bound to accept the validity of the constitution to which its owed its existence, and that the form by which its members were elected expressly denied to them constituent powers”. David Lindsay Keir, *The Constitutional History of Modern Britain Since 1485* (London: Adam and Charles Black, 1960) at 226.

<sup>188</sup> I have discussed this conception at length in Joel Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, 2012).

<sup>189</sup> See for example Article 444 of the Constitution of Ecuador (2008).

In some cases, like in the Constitution of Bolivia, changes that involve the “total reform of the Constitution, or that affect its fundamental principles, rights, duties and guarantees, the supremacy of the Constitution or the amendment process”, must be adopted through a Constituent Assembly.<sup>190</sup> These constitutions seek to regulate the exercise of constituent power and, in that respect, to contradict its spontaneous and extra-legal character. However, they are best understood as attempts of providing the people with a means, even if imperfect, of re-activating their original constitution-making faculty.<sup>191</sup> Accordingly, they represent a radical alternative to the Lockean conception of constituent power as a right of resistance, pointing instead to a sovereign people that can abolish and create constitutions at will, regardless of the conduct of government.

## **VI. Final Thoughts: Constituent Power Today**

It would be tempting to say that the fifth conception of constituent power, constituent power as popular sovereignty, is something like the concept of constituent power fully realized, but by now things have become too fuzzy to offer such a conclusion.<sup>192</sup> Below, I outline a number of alternative ways of understanding the relationship between these five conceptions:

- a. *The true concept of constituent power can only be expressed through the idea of popular sovereignty.* One might insist that the fifth conception of constituent power provides the constituent subject with an absolute power to alter the fundamental laws (even in the absence of prior governmental abuses), and that such a power is superior to both the right of issuing binding instructions and the right of creating a new government if the conditions set in the social contract are transgressed. However, a similar power has been attributed to legislatures with constituent faculties, and those legislatures sometimes present themselves as embodiments of the people. A possible reply is that while it is true that Parliament (or the Crown) can be attributed with an absolute constitution-making power, a defining feature of the concept of constituent power is that it can only be legitimately attributed to a sovereign people.<sup>193</sup> But the

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<sup>190</sup> Constitution of Bolivia (2009), Article 411.

<sup>191</sup> A similar point was made by the Colombian Constitutional Court in Sentencia 551/03 at para 40.

<sup>192</sup> In this article I have not considered the possibility of external political actors taking part in the exercise of constituent power in a particular polity. See Zoran Oklopčić, “Constitutional (Re)Vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans”, 19(1) *Constellations* 81-101 (2012).

<sup>193</sup> This is the approach I adopted in Colón-Ríos, *Weak Constitutionalism*, fn. 188 above.

conception of constituent power as the right to instruct representatives rested on a similar premise, at least in the context of instructions that referred to changes in the fundamental laws.

- b. Constituent power progressed towards the fifth conception.** An alternative strategy would be to develop a narrative of constituent power as progressing towards the fifth conception, seeing parliamentary (or monarchical) constituent power as a primitive realization of the concept, and popular sovereignty as its highest manifestation. Accordingly, one could say that constituent power was first attributed to a sovereign monarch (backed up by an omnipotent God), whose powers included the establishment of juridical orders in far-away lands. After decades of political struggle that sovereign power was transferred to Parliament, and those political struggles gave way to the idea that the community possessed an ultimate constituent power to be only exercised as a response to governmental abuses. Subsequently, some citizens attempted to limit the legislature's constituent jurisdiction by asserting their right to issue binding instructions and, finally, the people became an omnipotent constituent body. The problem with this approach is that these five conceptions were used concurrently (and for the most part can still be used) to explain or justify different kinds of political practices. For example, the first conception was used in the United Kingdom to explain the sovereignty of parliament (a parliament limited politically by the possibility of the exercise of constituent power in its right of resistance version) and, in the same historical period, the second conception was part of the legal framework of colonialism.
  
- c. The five conceptions are at war with each other.** Even though, as a matter of actual political practice, these conceptions can largely operate concurrently, it would be possible to show that, conceptually, they are inconsistent with each other. For example, it could be argued that the idea of parliament as constituent power negates the sovereignty of the people and that the right to instruct representatives negates parliamentary sovereignty. Or, that constituent power as a right of resistance points towards a conservative constitutional tradition uncomfortable with popular episodes of constitution-making, and that the right to instruct representatives is a non-deliberative and insufficient alternative to sovereign constituent assemblies. Although certainly plausible, there seems to be an important limit to the explanatory value of

this approach, as it would tend to repress, rather than bring to the surface, the many affinities and connections that exist between these conceptions.<sup>194</sup>

- d. ***Constituent power is a single juridical category.*** An opposite, but equally plausible route would attempt to find a set of unifying features between the five conceptions, to try to protect constituent power as a single and coherent juridical category. For example, one might say that these conceptions all refer to the same kind of power, what varies is who can exercise it and/or under what circumstances. After all, constituent power always points towards a power distinct to that of ordinary law-making. That is, the entity attributed with the faculty of exercising constituent power (even if it is an ordinary legislature, the people, or the Crown) acts in a special character when it engages in constituent activity. Moreover, insofar as it is a power that can alter the constitution without being subject to it, its exercise is always extra-constitutional; it is a power that creates a constitutional order but that is, and always remains, exterior to it. The main problem with this approach is that it would inevitably pay little attention to the important differences in the ways constituent power has been conceived historically, thus obscuring the role the concept has played, and can play, in actual constitutional practice.

Regardless of how illuminating these avenues might prove if pursued further, they all fail to fully bring our attention to the fact that appeals to the concept of constituent power typically involve some sort of challenge to the constitutional status quo. Accordingly, a more fruitful way of understanding the relationship between these five conceptions is to see them as procuring a change in the locus of the ultimate constitution-making power, a constitutional rupture that would bring the juridical order closer to the people. Nevertheless, once the desired rupture is achieved and, as a result, constituent power is in some way institutionalized or attributed to a particular entity, the destabilising character of the concept begins to wane. In this way, for example, the idea of Parliament as constituent power can be understood as a way of resisting the absolute power of the Crown. However, once Parliament became the ultimate constitution-making power, the transformative force of *that* conception began to lose its force, even though claims about constituent power reappeared in a different form.

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<sup>194</sup> Moreover, it is possible to think of a system in which constituent power is shared between parliament and people (the latter only playing an active role when fundamental constitutional changes are to be adopted). See Dicey, fn. 94 above.

For instance, constituent power as the right to instruct representatives or constituent power as popular sovereignty presented themselves as challenges to the constituent jurisdiction of Parliament (insisting that Parliament could not engage in certain constitutional changes unless instructed by the people, or that there are some changes that can only be adopted by the people making use of special constitution-making bodies). Similarly, the recognition of the constituent power of the colonial legislatures marked a rupture with the imperial project and transferred the ultimate source of constitution-making power from Westminster to overseas territories. However, once a colony becomes an independent state, its newly asserted constituent power might itself become the source of democratic discomfort, and the former colonial people may present itself as possessing a constitution-making power superior over, and independent from, the recently established legislature.

In those more recent constitutional orders that, having been created by constituent assemblies that successfully present themselves as legitimate means for the exercise of constituent power, and that attempt to provide the people with mechanisms to exercise its constitution-making faculties, the potential reactivation of constituent power will always remain as a permanent threat to the survival of the existing constitution. Constituent power is thus a force that challenges juridical systems from the outside and that, even when institutionalized, might re-emerge at any moment to destabilize it. In this respect, if it is to have a place in contemporary constitutional theory and practice, constituent power should be seen not only in light of its usefulness for explaining the nature of constitution-making, but in light of its transformative impulse, which procures to increase the political power of those that are subject to, but not yet authors, of a constitutional regime.